(1) 86 1774

NO.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

GEORGE ALBERT RAMIREZ,
Petitioner,

V.

STATE OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

1. Whether consistent with the Fourth Amendment to the United States Constitution a forcible seizure of a person immediately followed by a maximum level of comprehensive custodial restraint ab initio may be sustained upon less than traditional probable cause?

2. Whether probable cause to sustain such an intrusion may be predicated merely upon later presence in the general vicinity of an alleged offense?

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IN THE SUPREME COURT

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GEORGE ALBERT RAMIREZ,
Petitioner,

V.

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PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF NEVADA

George Albert Ramirez, defendant in the proceeding below, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Nevada in this case.

OPINIONS BELOW

The opinion of the Nevada Supreme Court (App. A, infra, A-1 through A-5) is yet unreported. The opinion of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark was not reported. (App. B, infra, A-6 through A-19).

JURISDICTION

The judgment of the Nevada Supreme Court was entered on February 6, 1987. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

> and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 21, 1985, a complaint was filed in the Justice Court in and for the Township of Las Vegas, Clark County, Nevada charging the Petitioner Ramirez with a series of offenses allegedly associated with a sexual assault occurring on January 13, 1985.

Pursuant thereto, a preliminary hearing was conducted before a justice of the peace of that court on February 28, March 1, March 4 and March 5, 1985.

At that hearing, Sergeant George Tuggle of the Las Vegas Metropolitan Police Department testified that on the morning of January 13, 1985, he responded in his patrol vehicle to the area of an apartment complex where units in the field were advised by radio that an "attempted sexual assault" had been reported. (A-21). He testified that the assailant was described as a "latin male, 5'8", medium build, having a maroon jacket with white stripe and wearing jeans. Further described as having a beard and moustache and having dark, curly hair."[1] (A-21-A-22).

---

[1]police were further advised by the reporting party that the individual had since fled the area.

Nearly a half hour after the radio broadcast of a reported attempt, Tuggle seized the Petitioner Ramirez who was then walking along a public street[2] outside the perimeter security wall enclosing the apartment complex.[3]

Observing Petitioner Ramirez from the rear, the officer pulled directly up to the curb behind him and activated his emergency lights. Immediately stepping out of the vehicle, Tuggle commanded the petitioner to stop, at gunpoint. Having

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[2]At this time, the officer observed vehicular traffic travelling in both directions.

[3]At the time of his seizure, the petitioner was walking in the direction of the security booth at the main entrance to the subject apartment complex and toward a neighborhood convenience store on the same street which was then open for business. The petitioner was also walking away from the location of a restaurant-bar on the same street which was also open for business at that time.

determined to so seize "any male" in the area, notwithstanding the description given by the reporting party, the officer never observed the petitioner from the front prior to undertaking this action.[4] (A-28).

Conducting no threshold inquiry of any kind, Tuggle ordered Petitioner Ramirez to lay face-down on the ground, whereupon the petitioner was handcuffed from behind. Characterizing this procedure as a "felony apprehension", the officer testified that the petitioner was consistently subjected to maximum level of custodial restraint

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[4]In contradistinction to the description provided by the reporting party which was broadcast to patrol units in the field, Petitioner Ramirez was wearing neither jeans nor a maroon jacket with a white stripe. Neither did he have a beard or moustache.

ab initio, and that the intrusive quality of his custodial condition could not have been enhanced. (A-30--A-33).

Requesting assistance, Tuggle thereupon broadcast a police radio announcement that "the culprit" had been "apprehended". (A-33--A-35).

Following the preliminary hearing, on March 13, 1985, an information was filed in the Eighth Judicial District Court in and for the County of Clark, State of Nevada, charging the petitioner with sexual assault, battery, robbery and burglary, which allegations were predicated upon evidence derived from his January 13, 1985 arrest.

Pursuant to the testimony adduced during the preliminary hearing before the justice of the peace, petitioner moved, in the district court, to suppress any and all such evidence on federal constitu-

tional grounds. That motion was filed on May 10, 1985, and a hearing on the motion was held on June 5, 1985 before the district court. (A-1, A-6-A-19).

At the conclusion of the hearing, the district court denied petitioner's motion--orally, and from the bench. (A-6-A-19). Thereafter, no written findings or conclusions were ever entered by the district judge.

On June 7, 1985, Petitioner Ramirez entered conditional pleas of guilty to the allegations contained in the information, contingent upon appellate review of the denial of his motion to suppress evidence. (A-1). Pursuant thereto, a judgment of conviction was entered and sentence was rendered upon petitioner by the district court on July 25, 1985. Five consecutive life sentences of incarceration in the

Nevada State Prison were imposed upon Petitioner Ramirez. (A-4-A-5).

On August 13, 1985, notice of appeal to the Supreme Court of Nevada was duly filed and on March 24, 1986 petitioner filed his opening brief in that court. In response to the state's answering brief, petitioner filed his reply on July 23, 1986.

On February 6, 1987 the Nevada Supreme Court entered its opinion and order dismissing petitioner's appeal in this cause. (App. A, A-1 through A-5). It is from the judgment of the Nevada Supreme Court that the petitioner now seeks certiorari from this Court.

REASONS FOR GRANTING THE PETITION

This case presents two important questions concerning the application of the Fourth Amendment guarantee of freedom from unreasonable searches and seizures,

as incorporated within the Fourteenth Amendment prohibition against abridgment by state action.

First, the opinion of the Nevada Supreme Court dismissing petitioner's direct appeal, holding that the character and conditions attending the seizure of the petitioner by local police did not exceed the contours of a threshold encounter justifiable upon less than probable cause to arrest, seriously misconstrues the requirements imposed by this Court in its previous Fourth Amendment jurisprudence, and is in conflict with the decisions of the federal circuit courts of appeal in this critical area of consitutional adjudication.

Second, the Nevada Supreme Court's conclusion that sufficient suspicion justified the nature and quality of the comprehensive custodial restraint imposed

upon the petitioner from and after the time of his initial seizure on the morning of October 13, 1985, is similarily inconsistent with applicable federal appellate jurisprudence and unsupported by the factual record.

Trivializing the significance of the undisputed employment of absolute physical force and restraint in effectuating the petitioner's seizure ab initio, the Nevada Supreme Court has utterly failed to recognize and draw the critical constitutional distinction between the lesser-intrusion concept of the properly limited threshold encounter and the nature and quality of conditions characterizing traditional arrest. Further failing to differentiate between the respective standards of requisite suspicion applicable to each, the court below has disregarded and otherwise minimized the federally

guaranteed protections of the Fourth and Fourteenth Amendments in this cause.

In order to sustain the opinion of the trial court denying petitioner's motion to suppress evidence in this case, Nevada's court of last resort has further exceeded and otherwise ignored the evidentiary record on appeal, thereby violating the limitations of judicial review.

A. The Record Clearly Established That Petitioner's Seizure In This Case Constituted An Arrest Ab Initio Requiring, But Not Support By, Probable Cause Under The Fourth Amendment, And Belies The Proposition That The Fully Custodial Character And Quality Of Petitioner's Seizure And Restraint Was Consistent With That Of A Merely Threshold Encounter.

As this Court made abundantly clear in Florida v. Royer, 460 U.S. 491, 499 (1983):

> Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of

> investigating a person who is no more than suspected of criminal activity the police may not .-. . seek to verify their suspicions by means that approach the conditions of arrest.

Thus, it is well-settled that "every arrest and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." Michigan v. Summers, 452 U.S. 692, 700 (1981). See Dunaway v. New York, 442 U.S. 200 (1979). Accordingly, as the United States Court of Appeals for the Ninth Circuit has admonished: "Detention . . . regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." Gonzales v. The City of Peoria, 722 F.2d 468, 477 (9th Cir. 1983). See United States v. Saperstein, 723 F.2d 1222, 1225-1226 (9th Cir. 1983). Indeed, as

this Court warned in Davis v. Mississippi, 394 U.S. 721, 726-727 (1960):

> Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed "arrests" or "investigatory detentions".

As the Ninth Circuit explained in Gonzales, supra, "even if the purpose of the seizure is investigatory rather than accusatory [if, by its nature and quality] such a seizure constitutes an arrest, it must be supported by probable cause." 722 F.2d at 477. Thus, as the Gonzales court instructed: "If the seizure involves anything more than the brief and narrowly-defined intrusion authorized by Terry, it must be justified by probable cause." Id. Accord, e.g., United States v. Rose, 731 F.2d 1337, 1342 (8th Cir. 1984) ("the determination of whether an arrest has occurred for Fourth Amendment

purposes does not depend upon whether the officer announced that [he was] placing the suspect under arrest. . . . An action tantamount to arrest has taken place if the officer's conduct is more intrusive than necessary for an investigative stop."); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) ("Appellants were not free to leave at any point after the initial stop by the agents. . . . It does not take formal words of arrest or booking at a police station to complete an arrest. . . .").

As this Court has further made clarion clear: "Where the standard is probable cause a . . . seizure of a person must be supported by probable cause particularized with respect to that person. . . ." Ybarra v. Illinois, 444 U.S. 85 (1979). And, it is axiomatic that "any facts developing after arrest cannot relate back

to legitimize an arrest already made without probable cause." Reiley v. Wyrick, 712 F.2d 382, 387 (8th Cir. 1983). Pursuant to the foregoing jurisprudence, the court below seriously misapplied the proper constitutional analysis mandated by this Court in evaluating the critical Fourth Amendment implications of the instant case. Indeed, the governing decisions of this Court clearly establish, in contradistinction to the instant holding of the Nevada Supreme Court, that Petitioner Ramirez was immediately subjected to full custodial arrest from and after his initial seizure on January 13, 1985. Accordingly, the court below erred in concluding that the quality of restraint imposed upon petitioner in this case was sustainable upon less than the probable cause requirement of traditional arrest under the Fourth Amendment.

Indeed, by his own admission, arresting officer Tuggle seized the petitioner in the manner described in his testimony pursuant to his predetermination to so arrest "any male" in the area of the reported offense. As this Court has repeatedly admonished, such wholesale imposition of custodial procedures is anathema to our constitutional tradition of ordered liberty. See e.g., Kolander v. Lawson, 461 U.S. 352 (1983).

CONCLUSION

For all the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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By _____
VINCENT SAVARESE III, ESQ.

By _____
DAVID Z. CHESNOFF, ESQ.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 4th day of May, 1987, I duly deposited for mailing, postage prepaid, at Las Vegas, Nevada, three (3) true and correct copies of the foregoing to the following:

The Solicitor General
Department of Justice
Washington, D.C. 20530

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By _____
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Attorneys for Petioner
George Albert Ramirez

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I hereby certify that on the 4th day of May, 1987, I duly deposited for mailing, postage prepaid, at Las Vegas, Nevada, three (3) true and correct copies of the foregoing to the following:

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Attorneys for Petioner
George Albert Ramirez

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE ALBERT RAMIREZ, Appellant,	)	No. 16887
v.	)	
THE STATE OF NEVADA, Respondent.	)	ORDER DISMISSING APPEAL

FRIDAY, FEBRUARY 6, 1987

This is an appeal from a judgment of conviction of five counts of sexual assault and one count each of battery with the intent to commit a crime, robbery and burglary.

Appellant entered a plea of guilty to all counts charged on the condition that he be permitted to appeal the order of the district court denying his motion to suppress the evidence against him obtained as a result of his arrest. Appellant first contends that the arresting officer lacked

probable cause to justify the officer's display of his weapon and the use of handcuffs during his detention of appellant which immediately preceded the arrest. We disagree.

Neither the display of a weapon nor the use of a gun automatically elevates a detention to an arrest. See United States v. Roper, 702 F.2d 984 (11th Cir. 1983); United States v. Bautista, 684 F.2d 1286 (9th Cir. 1982), cert. denied, 459 U.S. 1211 (1983). Whether such intrusions upon an individual's liberty resulting in an arrest are permissible depends upon their reasonableness under the existing circumstances. Id. In the present case, when the investigating officer exited his vehicle and displayed his gun he had strong cause to believe that appellant was the perpetrator of a violent crime, and that appellant might become combative or attempt

to flee. Clearly, under these circumstances, the officer was justified in displaying his revolver. See Roper, supra. As appellant approached the officer, the officer was able to observe further evidence linking appellant to the recent, violent sexual assault. Pending the arrival of other officers, the investigating officer was justified in handcuffing appellant to ensure his own safety and that of appellant. See Bautista, supra. The officer was then able to obtain, via radio contact with other officers, additional details of the victim's description of her attacker, thus further strengthening the officer's cause to believe that he had located the assailant. Finally, upon the arrival of the backup officer, the investigating officer left the scene of the detention in order to search the area, again leaving only one officer alone with the

suspect of a violent crime. It is thus clear that at all times during the detention of appellant, the investigating officer used no more restraints upon him than were reasonable under the circumstances. Accordingly, we conclude that the district court did not err by denying appellant's motion to suppress.

Appellant also contends that the five consecutive sentences of life imprisonment imposed by the district court for the five counts of sexual assault are excessive. Each sexual assault upon the victim was a distinct crime and the state correctly prosecuted appellant for each offense. See Deeds v. State, 97 Nev. 216, 626 P.2d 271 (1981). Appellant pleaded guilty to each of the charged offenses. The consecutive sentences imposed were within the discretion of the district court. See

NRS 176.035. Appellant's contentions therefore lacking merit, we

ORDER this appeal dismissed.

/s/ GUNDERSON, C.J.

/s/ STEFFEN, J.

/s/ YOUNG, J.

/s/ SPRINGER, J.

/s/ MOWBRAY, J.

APPENDIX B

IN THE EIGHTH JUDICIAL DISTRICT COURT

COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	REPORTER'S
	)	TRANSCRIPT OF
vs.	)	MOTION TO
	)	SUPPRESS
GEORGE ALBERT RAMIREZ,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE THOMAS A. FOLEY,
DISTRICT JUDGE

THURSDAY, JUNE 5, 1985

9:00 o'clock A.M.

APPEARANCES:

For the State: THOMAS L. LEEN, ESQ.
Chief Deputy District
Attorney

For the
Defendant: VINCENT SAVARESE III, ESQ.
and
DAVID Z. CHESNOFF, ESQ.

Reported by: ELIZABETH A. DONNELLY
Official Court Reporter
C.S.R. No. 139

THE COURT: Let me tell you this, I have read the examination of Sergeant Tuggle down in the Justice Court. I have read the transcripts that are available in this record. . . .

. . .

THE COURT: I have reviewed the cases coming down on search and seizure involving this thing and with our United States Supreme Court in Florida versus Royer. As a matter of fact, that of course was where a young man in the Miami Airport purchased a ticket for cash under assumed names, checked two bags and so on. I don't believe that that particular case brings us to the same factual situation and the fact that perhaps Mr. Leen couldn't put one on you with all fours, that may be the problem too, but the fact that you disagree, I would like to point out that one of the comments made by the

new Supreme Court Justice O'Connell in Peconum versus United States, that if the plurality of opinion were to be judged by standards appropriate to the impressionist painter it should perhaps receive a high grade, but the same cannot be said if it is to be judged by the standards of judicial opinion. So indeed, even greater minds than we disagree rather markedly with one another.

In Texas versus Brown we have an entirely different situation. That brought in the plain view doctrine and so on but I did find a case in the Ninth Circuit, United States versus Cortez. I don't know if you saw it but might want to make a note of it. Find it quite helpful in this case, 101 Supreme Court 690, 1981 case and it was based upon the footprints in a desert area of south central Arizona, one set of which was found with the

instinctive design chevron on the footprint. On several occasions experienced border patrolers made a number of deductions: One, the chevron probably led groups of Mexican aliens north to the border to Highway 86 about 30 miles from the border; two, that the chevron traveled at night and when the weather was clear to a pick-up point where a vehicle would take the aliens; and three, the vehicle probably approached from the east. From all these deductions officers calculated that chevron would arrive at Highway 86 between 2:00 a.m. and 6:00 a.m. on January 31st, 1977.

They parked a patrol car at an elevated point where they could observe Highway 86. They saw two camper shells, pickups pass the night between 1:00 a.m. and 6:00 a.m.. One of these returned

within an hour and a half which officers had calculated it would take to get to the pick-up point and return. On the return trip officers stopped the vehicle, noticed an occupant in the passenger seat wore shoes with soles containing the chevron design. Asked the driver Cortez if he had passengers in the camper. He said he picked up some hitchhikers. Opened up the back of the camper where they found six illegal aliens. The defendants were later convicted of transporting illegal aliens.

The Ninth Circuit Court held that the officers didn't have adequate cause to make the investigation and as a result such evidence was to be suppressed. The United States Supreme Court held differently and reversed.

An investigatory stop must be justified by some subjective manifestation that the person stopped is or is about to be

engaged in criminal activity. That's citing Deleware versus Prouse and also taken from United States versus Brignoni-Ponce, Adams versus Williams and of course, Terry versus Ohio. Courts have used a variety of terms to capture the elusive concept of what cause is to authorize police to stop a person. Terms like articuable reasons and founded suspicion are not self-defining. But the essence of all that has been written is that the totality of the circumstances must be taken into account. Based upon the whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person of criminal activity.

There must be two elements: One, the assessment must be based on all the circumstances, from such data as police reports and modes or pattern of certain

types of law breakers. A trained officer may make deductions and draw inferences that would elude an untrained person. Such a test is not whether the officers had probable cause to conclude that the vehicle they stopped would contain chevron and the group of illegal aliens, rather the question is whether based upon the whole picture they, as experienced patrol agents, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity. On this record they so conclude.

Now let me point out here what we had. This is not just any citizen walking down one of our city streets at a reasonable hour that you would expect someone to be out. There was no indication that this young man was out jogging at this early hour. There were no other foot persons, pedestrians seen in this area at any rea-

sonable proximity to this time before or after. By that I say the record would indicate that since there were other officers on stakeouts, no other person had been apprehended.

Now there is one part here that disturbs me somewhat, if I were walking on Decatur from that corner walking away and a car approached with his headlights on behind me at that hour and with that limited traffic, you can bet I'd turn around and take a look to see who it is. Now I cannot supplement this record and I don't intend to, but I am of the opinion that this trained officer, the very fact that he selected--and he's testified in this case that he sought--as I noted on page 27, lines one through four--the most likely path of escape. He selected this. This is not, as I said, a greenhand. He has because of his experience, his know-

ledge of the area--I don't know whether it was 10 or 12 months experience in and about this big complex of some 500 units. This to me is excellent police work for one of our-can't hardly say boys in blue--from our Metro here, from one of our officers.

To select this spot shows good training, conscientious police work, and when he saw this person he saw that this person--forget whether it was then in his mind a male or a female--he did state that he believed it to be a male, had something in its hand, its left hand, that when he surmised that shadowy figure observed him, a 180 back the other way, not fleeing, not running. If he started to run, pow, the red lights would have been on him right there, be no question about it. He's hoping to avoid and hoping to have avoided being detected because he has a right to

rely that this policeman is looking the other direction and not in the rear-view mirror. So he tippy toes back or moves as quickly as he can but that person, by the time and circumstances of his starting up the car and coming around with the lights and all, I believe that it is a proper inference and conclusion that this officer made that this was the same person that was the shadow and that's suggestive of a secretive nature and conduct that's suspicious in and of itself irrespective of what this police officer had in mind.

This police officer knew that there had been a description, he saw with the lights on in his car as he's proceeding along, before he becomes parallel with the suspect. I'm amazed that this suspect didn't turn and look right into the face of these lights. Either one or several things: He did not want to be in

connection with the police or indeed he was not mentally alert at the time, that he wasn't dealing with a full deck because there's no way that a car could come up behind a person at 4 o'clock or 4:30 in the morning in December. It's an isolated place at that time. There was no one else in the area, little or no traffic out on the road. There's no public places nearby and there's no evidence to put forth here that there were any other foot traffic from any source.

It's my opinion with this there certainly is adequate probable cause for the detention, the detention when made and the placing of this person after observing, if you will, the blood on the face. Now having a full view there is reason for this officer to secure him not only for the officer's own security but for perhaps this person. The testimony as

I read it, it was not get down there in the dirt and put a foot on his back or any such thing, that I don't find anything here to indicate any cruelty to this suspect. I don't know, things I have at this time in front of me is he was told to get to his knees, first put your hands on your head, come around and face the front of my patrol car. When he did this and he was down on his knees and then on his face--and I still don't know whether it was on the street or what it was, I can't surmise anything except from what the officer has testified--that he did so for the benefit of the suspect, for the benefit of his own protection. Once he was secure he immediately went back, made a call to the other officer.

Now, this hiatus in here, this time in between and bringing over the one-on-one identification might actually

be icing on the case. I do believe--I don't want to add facts--but I do believe that if he at that time placed him under arrest as he faced him with the blood on his face, there would be ample cause for an arrest then. I am not holding that it was in fact an arrest at that time. I am of the opinion that he had grounds for detention. He did have the Terry versus Ohio standards and indeed the case of Texas versus Brown of 103 Supreme Court at 1535 75 Lawyer's Edition, 2nd 502, I believe that from the language contained therein that there was a complete and total right of detention and subsequent arrest. Therefore, the motion to suppress will be denied.

. . .

. . .

. . .

MR. SAVARESE: Thank you, your Honor.

THE COURT: We will be in recess.

ATTEST: FULL, TRUE AND ACCURATE
TRANSCRIPTS OF PROCEEDINGS.

/s/ ELIZABETH A. DONNELLY
Official Court Reporter

APPENDIX C

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,)
)
v.)
)
GEORGE ALBERT RAMIREZ,)
)
Defendant.)
)

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE JOSEPH T. BONAVENTURE,
JUSTICE OF THE PEACE

THURSDAY, FEBRUARY 28, 1985

APPEARANCES:

FOR THE STATE: THOMAS L. LEEN, ESQ.
DEPUTY DISTRICT ATTORNEY

FOR THE
DEFENDANT: VINCENT SAVARESE III, ESQ.
-AND-
DAVID Z. CHESNOFF, ESQ.

REPORTED BY: MARCIA J. LEONARD,
C.S.R. #204

BY MR. LEEN:

Q. Shortly after 4:30 in the morning hours, January 13, 1985, did you receive radio traffic over the Las Vegas Metropolitan Police Department radio airwaves that caused you to go to a certain place?

A. I did.

Q. What radio traffic did you receive?

A. Initially we received a broadcast of an attempt sexual assault occurring in the area of 1510 Indian River Drive which is the Pointes Apartments, South Decatur.

Q. Is that here in Las Vegas, Clark County, Nevada?

A. It is.

. . .

A. The initial broadcast was attempt sexual assault occuring in the area of the Pointes Apartments.

Q. About what time?

A. 0433 was when the call came in. Then came in suspect description, latin male, five eight, medium build, having a

maroon jacket with white stripe and jeans. Further described as having a beard and moustache and having dark curly hair.

. . .

Q. Did there come a time when you detained [an] individual?

A. Yes, there did.

Q. Please describe how that occurred?

A. With my headlights and patrol vehicle on and initiating my red lights on my vehicle, I stepped from my vehicle and verbally drew the attention of the individual and withdrew my weapon and effected a felony car stop.

Q. When you say car stop, you mean--

A. I'm sorry. Pedestrian stop.

Q. How did you go about doing that?

A. Upon exiting my vehicle, I stood behind my door . . , and utilizing my duty weapon, I pointed it at the individual and gave verbal instructions to him.

Q. As you saw the individual at this point, was he illuminated by the lighting you told us about and also by the headlights of the vehicle?

A. Not by the headlights of the vehicle because my vehicle was paralleling him.

. . .

A. I placed the subject on the ground in a felony apprehension . . . and conducted a pat-down.

Q. Did you recover any apparent weapons or anything like that in the pat-down search?

A. No weapons on him.

Q. Did you handcuff him at that time?

A. I did at that time.

. . .

Q. Did there come a time shortly thereafter when a fellow uniformed Las Vegas Metropolitan Police Department officer arrived on the scene where you were detaining the individual?

A. Yes. Officer Hagen, Tim Hagen, responded to my location to assist me with the individual I had stopped.

. . .

Q. After Officer Hagan arrived on the scene, what else did you do in terms of investigation, if anything?

A. I briefed Officer Hagen as far as having patted the individual down. He had -- he was also on this particular incident searching for a suspect. And Officer Hagen then advised the individual of his rights.

Q. Is that under the Miranda decision?

A. Per Miranda.

. . .

Q. Do you recall Officer Hagen asking the individual whether he understood his rights?

A. No, I didn't. I had initiated another search or investigation myself and had stepped away from the front of the patrol vehicle.

. . .

BY MR. SAVARESE:

Q. He would be walking toward -- if that person were indeed the culprit, he would be walking toward the area from which you anticipated the culprit to have been fleeing?

A. That's correct.

. . .

Q. You couldn't tell therefore, whether this individual fit the description at that time of the alleged suspect?

A. Other than physical height and general build, no.

. . .

Q. You wouldn't predicate an arrest on that information, would you?

A. No.

. . .

Q. Could you tell the approximate age of this person?

A. No.

Q. Could you tell the color of his hair?

A. No.

Q. Could you tell if he had latin characteristics?

A. No.

Q. Could you tell if he had growth of a beard or moustache?

A. No.

Q. Could you tell the color of clothing?

A. No.

Q. Type of clothing?

A. Other than he was wearing pants.

Q. How about his shirt, could you tell if he was wearing any shirt at all?

A. Not in the shadows, no.

Q. You couldn't tell if he was wearing a jacket or jewelry either?

A. No.

Q. Could you tell [what] this individual might have been wearing . . . ?

A. No.

. . .

Q. You mentioned a gas station on the corner of Tropicana. Isn't that a "Rebel" gas station, if you recall?

A. At the corner of Tropicana and Decatur.

Q. And is there not a convenience store in that station as well as a gas station?

A. Yes.

. . .

Q. This individual was not running or fleeing, was he?

A. No.

Q. And this individual had nothing in his hand; isn't that true?

A. Correct.

. . .

Q. How fast would you say you were going when you came up behind?

A. In my patrol vehicle?

Q. Yes, sir.

A. When I -- I would estimate somewhere around five miles an hour.

. . .

Q. Had you put the lights on prior to turning that corner?

A. My headlights were on when I turned the corner.

Q. Not your flashing lights?

A. Not my red lights, no.

Q. How long did you watch the individual, would you estimate, on the Decatur side before you flipped on those lights?

A. Probably three seconds, four seconds.

Q. And that would be from 30 yards?

A. Initially, that was probably about the distance between my patrol vehicle and the individual I was watching.

. . .

Q. That would be a total of a minute between the first observation that you made in the shadows, driving onto Decatur, coming up behind the individual on Decatur and stopping that individual, took a grand total of one minute, sir; is that right?

A. Those times were obtained by me by utilizing the computer. Whether it was 45 seconds approaching a minute, I can't acknowledge.

Q. Is that what's in your report?

A. Yes, 4:51. I then stopped the subject at 4:52.

Q. All right. Did you ever catch up to or pass the individual walking on the street before stopping him?

A. No.

Q. So that you never saw the front of that person before you stopped him?

A. Only a partial angle of the left side of the individual's face.

Q. You never had a front facial view?

A. Not until I stopped him.

. . .

Q. Would any other observation that you would have made been of the back of him; only the back of him --

A. No, I only observed the back of the individual.

Q. That's what I'm trying to get at. You said it better than I could.

So that you couldn't determine, before stopping him, that he had blood on his face, could you?

A. No.

Q. And you couldn't determine, before stopping him, that he had a beard or moustache, could you?

A. No.

Q. And you couldn't determine, before stopping him, if he had latin characteristics facially, could you?

A. Other than the individual on Decatur, while he was walking, appeared to have a dark complexion.

Q. Based upon your observation of what, sir?

A. Of his arms and the side of his face.

Q. And the reason you could see his arms is because he was not wearing a long sleeved maroon or blue or any other color jacket; isn't that true?

A. Correct.

Q. Now, I believe you testified that as of the time of your initial stop of that individual, you had implemented your flashing red lights?

A. Correct.

. . .

Q. You alighted from the vehicle yourself?

A. Yes.

Q. You had drawn your weapon and pointed it at the individual?

A. Yes.

Q. And you mentioned that you announced some instructions to him?

A. Yes, I did.

. . .

Q. By what means did you encourage him?

A. At any given time I would have said "keep your hands above your head or visibly where I can see them."

Q. And did you remind him you had deadly force trained on him at that time?

A. It was my impression he understood I was holding a weapon pointed at him.

. . .

Q. Had he followed your instructions? Did he succumb and submit to your instructions?

A. He cooperated fully.

Q. You immediately handcuffed the individual?

A. After I patted him down.

Q. After patting him down.
Would that be before establishing his identity and the reason for being in the neighborhood.

A. That's correct. . . .

Q. And then you mentioned that you had placed him in a spread-eagle position on the ground.

A. Initially, yes.

Q. Face down?

A. Face down with his arms out to the side.

Q. Handcuffed behind the back?

A. And I placed his arms behind the back and placed handcuffs on his wrists.

Q. Were there weapons found on the individual at any time?

A. I'm sorry?

Q. Were there weapons found on the individual at any time?

A. No weapons.

Q. There was no attempt to resist or flee?

A. No.

. . .

Q. Now, sir, let me ask you this question: As of your intent or your understanding at the time of your mission that morning, would you have stopped any man that you had seen in the physical position, vis-vis that apartment complex as was the Defendant that night?

A. Would I have personally?

Q. Yes, sir.

A. Based on my impression and observation of a male subject in that area; that's correct.

. . .

Q. It's fair to say, is it not, that from and after the first contact you had on Decatur in stopping the Defendant in this case, that he was not free to leave from and after that moment as far as you were concerned?

A. From the time I stopped him until I conducted further investigation; that's correct.

. . .

Q. As far as you were concerned, was he free to leave?

A. At what point?

Q. At any point after you stopped him, any point at all?

A. No.

Q. That would be at the time of this stop of this individual, that would be 4:52 again; correct?

A. Correct.

Q. You testified that you transmitted a broadcast to Officer Scholer who was within the perimeter?

A. Yes.

Q. And specifically you told him that you had apprehended an individual that you suspected of being the culprit in the matter?

A. Yes.

Q. Now, in your report, you described somewhat different than you do this transmission, than you do in your testimony. In your report, you stated that you told Officer Scholer "the suspect was apprehended by Sergeant Tuttle at approximately 4:52 hours."

Am I accurately reading that?

A. That's in the synopsis portion, correct.

Q. You used -- "the suspect"is your language?

A. Yes.

Q. And "apprehended" is your language?

A. Yes.

. . .

Q. What time was your initial stop?

A. I observed the suspect 0451.

Q. What time was the initial stop?

A. 0452.

Q. And that was described in your report as being the time in which you apprehended the suspect?

A. In the synopsis portion, yes.

Q. That's what I'm asking.

A. uh-huh.

Q. Elsewhere in your report, sir, on page 3 in paragraph 7 of your report, which would be the next to the last paragraph, you stated in there: "It should be noted that I observed the subject walking outside the fence line of the apartment complex in shadows at 0451 hours on 1/13/85 and took

that subject into custody at 0452 hours on the same date." Does it not state that?

A. Could I refer to the report?

Q. Sure. Page 3, next to the last paragraph of your report.

A. That's correct.

. . .

Q. This stop and detention or whatever it is ultimately considered, occurred more than 20 minutes after the alleged offense; isn't that true, sir?

A. Yes.

Q. At that time, were you ever advised either by virtue of security at the Pointes Apartments or anyone at the time, that the Defendant you had stopped and then arrested, was a former resident of the Pointes Apartments?

A. I recall somebody saying that he -- that the individual had lived at the Pointes Apartments. But beyond that, I had no other knowledge.

. . .

Q. The Defendant, when he was arrested by you or stopped by you, did not have in his possession a lady's purse?

A. No.

Q. And to your knowledge, no such purse has ever been found in that area or anywhere?

A. To my knowledge, no.

Q. Was there any lady's valuables, jewelry or other feminine items of jewelry in the pockets of the Defendant that you stopped?

A. I personally didn't search his pockets. I only patted for weapons. To my knowledge, there wasn't.

Q. No one told you that he has a lady's brooch in his pocket?

A. No, I never received any information.

. . .

Q. Do you know how much money the Defendant had in his pocket at the time of his arrest?

A. No, I do not.

. . .

. . .

Q. I take it then, sir, it would be necessary that the decision to stop and the turning-on of the red lights obviously was made in less than a minute?

A. Correct.

Q. And by the way, in terms of what your approach and your initial seizure and stop of this individual was, what more could you do to make it an arrest than it was, aside from telling him that he was under arrest, aside from making the announcement: "You are under arrest"? Is there anything more you could do to enhance custody from the state of custody that you imposed from the time of your initial stop?

A. No.

Q. The state of custody, the level of custody was consistent and the same from the time you stopped him--from that moment on?

MR LEEN: Objection to determine level of custody. He already answered he wasn't free to leave. We've established that.

MR. SAVARESE: This is recross of questions specifically in the area of whether it was an arrest or not.

THE COURT: overruled.

BY MR. SAVARESE:

Q. Was the amount or level of custody -- of restraint-- increased at any time

after your initial stop or was your initial imposition of restraint full and consistent from and after that time?

A. It was consistent.

MR. SAVARESE: That's enough. Thank you, your Honor.

(2)

No. 86-1774

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE ALBERT RAMIREZ,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

REX BELL, District Attorney
JAMES TUFTELAND
Chief Deputy District Attorney
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TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Whether a forcible seizure of a person followed by a maximum level of restraint and comprehensive custodial detention ab initio may be sustained upon less than traditional probable cause.

2. Whether probable cause to sustain such an intrusion may be predicated merely upon later presence in the vicinity of an alleged offense.

OPINION BELOW

The Nevada Supreme Court disposed of petitioner's case by way of an unpublished order dismissing appeal. See, Petition, Appendix A.

STATEMENT OF FACTS

The defendant's representations as to the facts of the case are supplemented and to some extent controverted as follows:

On the morning of January 13, 1985, a 25 year old woman named Jennifer Guisto

was brutally beaten and sexually assaulted by petitioner Ramirez. After leaving work and a post-work social party in Las Vegas, the victim arrived at the parking lot of her apartment at "The Pointes." She walked toward her apartment and realized she had forgotten her purse and returned to her car. Just before she got to her car she was grabbed from behind by Ramirez with him using his hand as a claw with his fingers into her face, down her throat and up her nose. The victim began to bleed profusely. She tried to tell her assailant to "take my money" and then tried to get away, resulting in the same claw hold being applied again. Her neck was twisted, she was threatened with death and her head was slammed against the pavement. The victim continually tried to get away, but Ramirez slammed her head against the pavement and goughed her eyes with his fingers, ripping

out one of her contact lenses. Next, the victim was choked until she blacked out. Finally, she was forced into her car where she was repeatedly sexually assaulted including forced fellatio, fingers in her vagina and sexual intercourse. The victim was able to persuade Ramirez to let her go by saying that she would be his girlfriend, and after leaving her car she ran to a neighbor's apartment where the police were called. Various photographs and other items of physical evidence adduced at the preliminary hearing corroborated the victim's account of the savagery of the attack, including a bite mark on her face which was still clearly visible to the court six weeks after the attack, at the time of the preliminary hearing.

At about 4:33 a.m., Sgt. George Tuggle of the Las Vegas Metropolitan Police Department was on duty when he and other police

units heard a broadcast first described as an attempted sexual assault occurring three to five minutes earlier in the "Pointes" apartments, which is a complex with many hundreds of apartments located on the southwest corner of Rochelle and Decatur. About three to four minutes later, Sgt. Tuggle arrived at the southwest corner of the "Pointes."

Sgt. Tuggle, a police officer with over nine years of experience with the Las Vegas Metropolitan Police Department, was familiar with the area of town around the "Pointes." For many months he had patrolled that area during the nighttime hours and now he knew from his own experience that pedestrian traffic at 4:30 a.m., near the corner of Decatur and Rochelle was, at least, a very rare occurrence. Accordingly, Sgt. Tuggle turned off the lights on his police car and took up a position on

Rochelle about twenty-five yards west of Decatur in a darkened area. Sgt. Tuggle knew that the suspect in the crime was last seen on foot inside the "Pointes" and he hoped that in his haste to flee the scene of the crime the perpetrator would not see the police car until Sgt. Tuggle had seen him first. Sgt. Tuggle knew from the police broadcast that the suspect was a Latin male, 5' 8" tall, medium build, mustache, beard and dark curly hair, wearing blue jeans and a maroon jacket with a white stripe. About ten minutes after Sgt. Tuggle had taken up his position, he saw a figure come out of the shadows at the northeast corner of the "Pointes" walking on the grass about three feet from the wall around the "Pointes" and not on the sidewalk. The person was carrying what appeared to be a cloth-like object in one hand; he took two or three steps west on Rochelle and then suddenly, for no apparent reason, reversed

direction and went back around the wall. This action made Sgt. Tuggle think that this person did not want to contact the police. Sgt. Tuggle could not tell if the person was male or female at this point but based on the person's build, he believed the person was a male. The person did appear to be about 5' 6" to 5' 9", medium build and with dark hair.

Sgt. Tuggle started up his police car, made a U-turn, and went to the corner of Decatur and Rochelle. The lighting conditions on the Decatur side are very good and Sgt. Tuggle could see an individual about fifty yards from the corner of Decatur and Rochelle, walking southbound, about three feet from the outside wall of the "Pointes" but not carrying anything in either hand. The person was still walking on the grass rather than the sidewalk. As Sgt. Tuggle approached this person, he could see that

it was a man about 5' 8" to 5' 9" tall, medium build, dark curly hair, a beard and a moustache. Except for not wearing the maroon and white jacket, the man fit the suspect description exactly. In addition, the police broadcast referred to the suspect as a Latin male and the person Sgt. Tuggle saw walking had a dark complexion. There were no other people in the vicinity.

Sgt. Tuggle stopped his police car and displayed his weapon while standing behind the door of the car. He ordered the person to stop and approach the patrol car. As this occurred, Sgt. Tuggle confirmed the impression he had as he first approached the person from behind and pulled beside him, that the person did have dark curly hair, a moustache and a beard. Sgt. Tuggle ordered the person to lie on the ground while he was patted down and handcuffed. As the person first approached the patrol

car, Sgt. Tuggle noticed he had what appeared to be blood about his face and this impression was confirmed when the person got to his feet after being handcuffed. Sgt. Tuggle noticed that the person was wearing a gold chain and Playboy emblem. He immediately contacted another police officer who was with the victim to ascertain whether her assailant was wearing this item. Officer Scholer learned from the victim that the assailant had worn such an item and so advised Sgt. Tuggle. Shortly thereafter, Sgt. Tuggle was joined by Officer Hagen and the suspect (Ramirez) was given Miranda warnings. Sgt. Tuggle then made a search along the wall of the "Pointes." About twenty-five yards from the corner of Decatur and Rochelle, on the inside of the wall, he found the maroon and white jacket worn by Ramirez during the beating and sexual assault of the victim.

It is apparent that the jacket had been carried by Ramirez in his hand as he fled along the wall and around the corner before seeing Sgt. Tuggle's police car. It was laying just where Ramirez had thrown it over the wall in an effort to conceal a conspicuous identifying piece of clothing. Shortly thereafter, the victim was brought by ambulance to the location where Ramirez was being detained. She identified him as her assailant and he was placed under arrest.

A R G U M E N T

THE DISTRICT COURT RULED CORRECTLY IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

The defendant's entire "unlawful arrest" argument is based on authorities and situations which are inapposite to the

circumstances of the case at hand. Moreover, the argument "leapfrogs" over barriers of logic and, where necessary, skirts or distorts the true facts of the instant case where clear exposition of the facts would destroy his argument.

For example, a main thrust of defendant's argument is that defendant was "under arrest" as soon as he was initially "seized" by Sgt. Tuggle because the degree of custody (i.e. - not free to leave, handcuffs, etc.) never changed from the initial detention until Ramirez was formally arrested. This argument ignores basic Fourth Amendment theories and the types of fact situations giving rise to such principles. Indeed, in <u>any</u> case where as a result of an initial detention there arises probable cause to make an arrest there will <u>always</u> be a continuation of custody from the initial "Terry" stop until the ultimate arrest, during which the suspect is seized and

stays seized. Despite the impression sought to be created by defendant, there is nothing wrong with this type of a procedure.

In order to make an investigatory detention of a person, a police officer must have what this Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) called "specific and articulable facts" which, together with reasonable inferences from these facts, would justify the intrusion on a citizen's liberty.

Sgt. Tuggle: (1) knew that a crime of violence had occurred shortly before he arrived at the vicinity of the "Pointes"; (2) knew that the suspect was last seen on foot and therefore, as this Court said in Terry, he could reasonably assume that the suspect might continue on foot; (3) was in a location from which he might observe the suspect flee from the area; (4) arrived there soon enough after the crime to have

a reasonable belief that the suspect would not have penetrated Sgt. Tuggle's perimeter location; (5) knew that it was an isolated area; and (6) knew that foot traffic would be extremely unusual at 4:30 a.m.

At this juncture it is important to note that some of the petitioner's representations in his petition constitute a distortion of the true facts. (See, Petition, p. 5, fn. 3). Across the street there is a hardware store, but it was not open at 4:30 a.m. The bar and restaurant which are open 24 hours a day are not "in proximity" to the location where Sgt. Tuggle stopped Ramirez. During the lower court suppression hearing the court asked Sgt. Tuggle: "In relation to the corner of Rochelle and Decatur, how far away was any business that could have been open and doing business at or about this time?" Sgt. Tuggle answered, "At least a half a

mile, sir, be Billy's West Lounge." The 7-11 store at Decatur and Tropicana was further away than Billy's Lounge.

Petitioner also states that at the time Tuggle detained him, there was vehicular traffic in both directions on Decatur. (Petition, p. 5, n. 2). Tuggle testified that while he was parked on Rochelle for a period of approximately ten minutes, he thinks a couple of cars passed by on Decatur. Petitioner's attempt to have this Court believe that there was some significant vehicular traffic on Decatur at the time of the stop of petitioner is not borne out by the record.

Petitioner also claims that he was not wearing jeans when stopped. (Petition, p. 6, n. 4). That statement is not supported by the record in this case. Both the victim and Tuggle said he was wearing jeans.

Returning to the articulable facts known to the officer, Sgt. Tuggle: (7) saw

a figure in the shadows walk around the northeast corner of the Pointes close to the wall and not on the sidewalk; (8) saw this figure then go a few steps and, for no apparent reason, reverse tracks and go back the other way. As Terry permits Sgt. Tuggle to do, he inferred that the person did not want to contact the police. Sgt. Tuggle started his police car and when he got to the corner of Rochelle and Decatur he (9) saw a person (Ramirez) walking southbound away from Sgt. Tuggle and walking close to the wall and not on the sidewalk. Due to the open spaces in the vicinity and because there was no one else around, Sgt. Tuggle inferred that this was the same person who had just ducked around the corner. As Sgt. Tuggle closed with this person he noted that the person was (10) male; (11) medium build; (12) about 5' 9" tall; (13) wearing blue jeans; (14) no longer had the cloth-like object in his hand; (15) had dark curly hair;

(16) a beard; (17) a moustache; and (18) was dark skinned (knowing the suspect was described as Latino or Hispanic).

The foregoing 18 factors distinguish Sgt. Tuggle's stop and detention of Ramirez from the "roust" situations condemned by this Court. The fact that Sgt. Tuggle first pointed a gun at Ramirez and shortly thereafter handcuffed him does not alter the fact that what occurred in the case at bar was a classic example of excellent police work catching a dangerous criminal fleeing from the crime, first detaining him on reasonable suspicion and shortly thereafter arresting him on probable cause.

In United States v. Bautista, 684 F.2d 1286 (9th Cir. 1982), three men robbed a bank one afternoon. A police radio broadcast described the three as of Mexican or Iranian descent, and being armed. Two police officers were familiar with the area and drove to an area that they thought would

be a likely flight path. About fifteen minutes later, the two officers saw Bautista and Martinez walking about one-half mile from the bank. The officers noted that they were shabbily dressed and wearing short-sleeved shirts which appeared dry although it had been raining throughout the day and was raining at the time. The officers detained both suspects and frisked them for weapons with negative results. The two were then handcuffed. The police questioned the two and, based on the inconsistencies in their answers, arrested both for the bank robbery.

In Bautista, the defendants claimed that the initial stop was based on racial appearance alone and violated the requirements of Terry. The Court rejected this argument and held that there were articulable factors to validate the detention. The Court also rejected the defendant's arguments that because they were handcuffed

this transformed the stop from a "detention" to an "arrest":

> "On the one hand, handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not a part of a typical Terry stop. On the other hand, police conducting on-the-scene investigations involving potentially dangerous suspects maytake precautionary measures if they are reasonably necessary. The purpose of the Terry frisk is 'to allow the officer to pursue his investigation without fear or violence.' Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).
>
> Defendants argue that they were automatically under arrest once they were handcuffed because from that moment on they were 'not free to leave.' Defendants rely on United States v. Beck, 598 F.2d 497 (9th Cir. 1979), and United States v. Strickler, 490 F.2d 378 (9th Cir. 1974). We considered the same argument based on the same cases in United States v. Patterson, 648 F.2d 625, 632-34 (9th Cir. 1981). A brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a Terry stop and does not necessarily convert the stop into an arrest. Id. at 632-33. We specifically approved the use of handcuffs in United States v. Thompson, 597 F.2d 187 (9th Cir. 179). The handcuffs were reasonably necessary in Thompson because the suspect had 'repeatedly attempted to reach for his inside coat pocket, despite the officers' repeated

warnings not to.' Id. at 190. See also United States v. Purry, 545 F.2d 217, 219-20 (D.C. Cir. 1976)(handcuffing of suspect permissible because the suspect 'turned and pulled away' when the police officer placed an arm on him).

In United States v. Roper, 702 F.2d 984 (11th Cir. 1983), a police officer had seen a flyer that said that Roper was wanted for federal bail jumping and giving a vehicle description and license number. During the evening, but while it was still daylight, the officer saw the suspect vehicle with two men in it. The officer approached the car with his gun drawn and ordered both men to put their hands on the dash. Roper and the other man were ordered out of the car. Subsequently, Roper was arrested and was found to be carrying a weapon.

Roper claimed that the use of the weapon by the officer changed the situation from a detention to an arrest. The Court rejected this argument. The Court listed many cases, too numerous to recount in this

brief, where it has been held that if the pointing or display of a firearm is reasonable under all of the circumstances, it does not change a detention to an arrest. Counsel respectfully directs the Court's attention to Roper, supra, at 987-989, for a review of these numerous cases.

In United States v. Perate, 719 F.2d 706 (4th Cir. 1983), police had information that two passengers in a chauffeur-driven limousine were acting strangely, had a lot of money and were probably carrying drugs. Subsequently, police pulled the vehicle over and approached with drawn guns. They asked the driver to get out and smelled marijuana when the car door opened and also saw the occupants of the rear seat to be partially clothed. Subsequently, other drugs were found in the car and on the person of Perate. Perate contended that the police action was an arrest and not an investigatory detention. The Court rejected this argument by

stating:

> "The police action which brought Perate's automobile to a halt was an investigative stop, not an arrest. Brief stops in order to determine the identity of a suspicious individual or to maintain the status quo while obtaining more information are permitted if reasonable in light of the facts known to the officers at the time. Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972); Terry v. Ohio, 392 U.S. 1, 20-22, 88 S.Ct. 1868, 1879-1880, 20 L.Ed.2d 889 (1968).
>
> Perate claims the police actions escalated the stop to an arrest. He recites the blocking of his limousine with police vehicles and drawn weapons of the officers in support of his contention that the arrest was effected when the limousine was stopped. As this court held in United States v. Seni, 662 F.2d 277 (4th Cir. 1981), cert. denied, 455 U.S. 950, 102 S.Ct. 1453, 71 L.Ed.2d 664 (1982):
>
> > (t)he fact that the officer drew his gun does not necessarily elevate the stop into an arrest. Courts have held that an officer may draw his gun and conduct a frisk when justified as a reasonable precaution for protection and safety. (Citations omitted).
>
> Here, the officers had information that one of the two men in the limousine feared for his personal safety, but did not know which of the two was Trice. Although the blockade of an

automobile is an intrusion on the individual's rights, it was balanced by the necessity of neutralizing potential danger to policemen and one occupant of the limousine. See Terry, supra, 392 U.S. at 21, 88 S. Ct. at 1879.

Based on the foregoing legal authorities and upon logic and common sense, it is clear that there was no violation of the defendant's Fourth Amendment rights in the circumstances of the case at bar.

In his treatise, Professor LeFave discusses the very issue presented by this petition:

"To conclude that the officer's conduct must be viewed as an arrest from the outset because the defendant's restriction of liberty of movement was then complete and that no significant new restraint followed when the arrest was formally made, is to create a test which would cast doubt upon most stops. The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time, and if investigation uncovers added facts bringing about an arrest, the early stages of the arrest will not involve any new restraint of significance.... A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on

movement is incomplete, but rather because it is brief when compared with arrest, which (as emphasized in Terry) 'is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.'

* * *

The correct view, then, is that an otherwise valid stop is not inevitably rendered unreasonable merely because the suspect's car was boxed in by police cars in order to prevent it from being moved. Likewise, it cannot be said that whenever police draw weapons the resulting seizure must be deemed an arrest rather than a stop and thus may be upheld only if full probable cause was then present. The courts have rather consistently upheld such police conduct when the circumstances ... indicated that it was a reasonable precaution for the protection and safety of the investigating officers. Likewise, under certain circumstances a police order that a suspect lie on the ground will be permissible, as will the surrounding of a pedestrian-suspect by several officers." 3 W. LeFave, Search and Seizure § 9.2(d) at 363-366.

Professor LeFave's view was cited with approval in State v. Gardner, 626 P.2d 56 (Wash. 1981) and State v. Williams, 663 P.2d 1368 (Wash.App. 1983). In United States v.

Merritt, 695 F.2d 1263 (10th Cir. 1982), the Court addressed this issue of whether the force used in making a stop converts the stop into an arrest requiring probable cause. The Court stated:

> "Under this analysis it is apparently assumed that at some point the show of force made by police conducting a stop becomes so great as to render it an arrest, regardless of the justification that may exist for the degree of force used. Resolution of the question turns on the amount of force used to effect the stop: one level of force is permissible when there is probable cause for an arrest, but when the police have only a reasonable suspicion, only a more restricted use of force is permitted.
>
> It seems to us that to focus the analysis in this manner diverts attention from the court's true concern in any Fourth Amendment case--whether the police conduct, in light of all the circumstances, was reasonable. We should not ask whether the force used was so great as to render it an arrest but, instead, whether the force used was reasonable. Whenever the police confront an individual reasonably believed to present a serious and imminent danger to the safety of the police and public, they are justified in taking reasonable steps to reduce the risk that anyone will get hurt. They should not be constrained in their

> effort to reduce the risk of injury or death simply because the facts known to them create a reasonable suspicion, but do not rise to the level of probable cause."

Id. at 1373.

Sgt. Tuggle was alone, late at night, in a fairly isolated area surrounded by desert and open area. He saw an individual who almost entirely fit the description of a person who, just twenty minutes earlier, had committed a crime of violence. Tuggle's detention of that person was not only entirely lawful, but his failure to act as he did would have been a dereliction of his duty as a police officer.

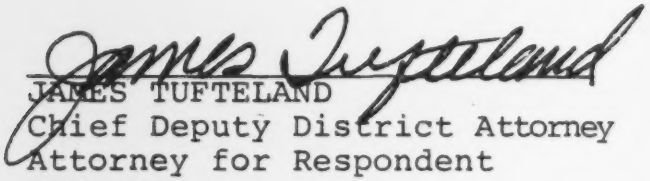
CONCLUSION

It is apparent from the existing case law in this area that the Nevada Supreme Court did not misconstrue Fourth Amendment jurisprudence in dismissing petitioner's direct appeal. Nor is that Court's Order in conflict with decisions of the Federal

courts of appeal. In fact, its order was based on decisions from the Circuit courts of appeal. There exists no sound basis for granting certiorari in this case. Respondent prays that the petition be denied.

Dated this 4th day of June, 1987.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed three copies of RESPONDENT'S BRIEF IN OPPOSITION to the attorneys of record listed below on this 4th day of June, 1987:

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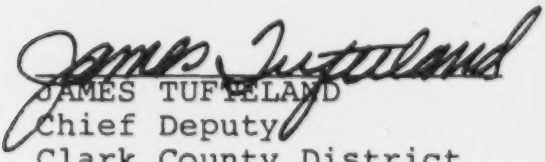

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